

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

FIVE STAR QUALITY CARE INC. d/b/a
HEALTH CENTER OF GREATER
WATERBURY ¹

Employer

and

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, SEIU

Petitioner

Case No. 34-RC-2078

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Employer operates a 150-bed long term skilled care facility in Waterbury, Connecticut. The Petitioner, which currently represents the Employer's licensed practical nurses (LPNs), certified nurses aides (CNAs), and laundry, housekeeping and dietary employees, now seeks to represent a unit consisting of approximately 15 full-time, regular part-time and per diem registered nurses (RNs). The Employer contends that all the petitioned-for RNs function as charge nurses and as such are supervisors within the meaning of the Act. In addition, the Employer contends that RNs Sophia

¹ The Employer's name appears as corrected at the hearing.

Evia, Lisa South, and Francia Penabella should be excluded as supervisors because they regularly serve as RN Shift Supervisors. For the reasons noted below, I find no merit to the Employer's contentions.

1. Overview of Operations

Primarily responsible for the operation and overall supervision of the facility is Administrator Dennis Quarles. Reporting to Quarles is Director of Nurses (DON) Donna Perugini, who has overall responsibility for all nursing care at the facility. Reporting to Perugini is Assistant Director of Nursing (ADON) Susan Couture; Staff Development Coordinator Tracy Houle; Admissions Coordinator Shari Yard; Infection Control Nurse Mary Jane Prescott; MDC Coordinator Dianne Matyka; Shift Supervisors Marie Daddario, Gloria DeLeon, Margarie Gregario, Paul Rahe and Nancy Krulicki; and RN Supervisors Laureen Mancinone, Leo Tolentino and Jessie Work. The parties stipulated that all of the above-described individuals should be excluded from the petitioned-for unit as supervisory or managerial employees.

The Employer's facility is divided into six nursing units on two floors. The facility operates 24 hours a day, 7 days per week, and is staffed by approximately 200 employees pursuant to the following three-shift per day schedule: 7:00 a.m. to 3:00 p.m. (day shift); 3:00 p.m. to 11:00 p.m. (evening shift); and 11:00 p.m. to 7:00 a.m. (night shift). The Employer typically staffs its nursing function in the following manner. On the day shift weekdays, there are two Shift Supervisors, one RN, five LPNs, and 18 CNAs. On the evening shift weekdays, there is only one Shift Supervisor, two RNs, four LPNs, and 14 CNAs. On the night shift weekdays, there is one Shift Supervisor, two RNs, two LPNs, and eight CNAs. The weekend day shift has only one Shift Supervisor, one RN, five LPNs, and 16 CNAs. The weekend evening and night shifts are staffed in the same manner as the weekday evening and night shifts.

The DON, ADON, Admissions Coordinator, Infection Control Nurse, MDS Coordinator, and Staff Development Coordinator (also referred to herein as nursing managers) all work a Monday through Friday schedule, with their hours varying between 7:30 a.m. and 4:30 p.m. However, the Infection Control Nurse, MDS Coordinator, and Staff Development Coordinator "flex up" by working an 11 a.m. to 7:00 p.m. shift approximately once a week. In addition, the two Shift Supervisors who work the day shift from Mondays through Fridays are occasionally scheduled to work

evening, night and weekend shifts. Similarly, evening Shift Supervisor Gloria DeLeon and night Shift Supervisor Paula Rahe work the evening and night shifts on weekends every other week. Finally, the Admissions Coordinator, Infection Control Nurse, MDS Coordinator, Staff Development Coordinator, and the two day Shift Supervisors are each assigned one nursing unit for which they have overall responsibility for resident care.

Particularly on weekends, because there are an insufficient number of Shift Supervisors to cover all scheduled shifts and because State law requires that an RN be present in the facility at all times, the Employer regularly utilizes RNs to serve as Shift Supervisors (herein referred to as RN Shift Supervisors). However, like the Shift Supervisors, the RN Shift Supervisor may also have a regular nursing assignment while functioning as an RN Shift Supervisor.

A monthly supervisors meeting is held which is attended by the nursing managers and the Shift Supervisors. Although RNs may attend the monthly meeting, their attendance is not required. There is also a daily meeting, known as the “morning report”, on Mondays through Fridays that is attended by the Administrator, all department heads, all nursing managers, and the assigned Shift Supervisor for that day. RNs do not attend the morning report unless they are functioning as the RN Shift Supervisor. The record indicates that the following matters are discussed during the morning report: the “24-hour report”, “any pertinent things that have happened or need to be followed through on for many different, social services, safety”, “any upcoming meetings for that day”, “any old business that needs to be addressed”, and “follow-up on survey results”.

2. Charge Nurses

As noted above, the Employer considers all RNs to be charge nurses. The Employer proffered the RN job description in support of its contention that the charge nurses are supervisors. In this regard, the RN job description states that the RN reports to a “Charge Nurse or Unit Manager”, and that the RNs overall function is to “provide, plan, coordinate or manage nursing services and health education to residents requiring complex care.” Under the list of 38 “essential functions and responsibilities”, the only reference to any purported supervisory responsibility is the general requirement to “supervise the serving and documentation of prescribed diets and fluid intake”. All other

functions and responsibilities are directly related to resident care. Under the heading “leadership”, the RN is required to “demonstrate willingness to try new tasks, generate new ideas for change, evaluate and recognize priorities, select effective team members, challenge others to learn, keep current and integrate new information, communicate and model organization values, foster high performance, recognize need for and provide adequate resources.” RNs are also required by their job description to “report suspected violation of security/confidentiality issues”, and, under the heading “interpersonal skills”, to “set clear standards for performance, evaluate job performance and provide effective feedback, establish systems to measure effectiveness, efficiency and service and create and maintain reporting mechanisms.”

In addition to the RN job description, the Employer proffered the testimony of DON Perugini in support of its contention that the charge nurses are supervisors. According to Perugini, charge nurses are responsible for ensuring that the Employer’s policies and procedures are being followed. Thus, according to Perugini, if a charge nurse determines that some policy or procedure is not being followed, they must take appropriate corrective action, up to and including disciplinary action, and if a charge nurse fails to take appropriate corrective action, they are held accountable. However, the Employer proffered no specific evidence in support of these contentions. To the contrary, the Employer stipulated that it had no examples of charge nurses issuing written discipline to either CNAs or LPNs. Nor was any evidence proffered showing that charge nurses have been held accountable for failing to ensure that the Employer’s policies and procedures are being followed. It is also undisputed that charge nurses have no involvement in the evaluation of employees.

Thus, the only record evidence in support of the Employer’s contention that the charge nurses are supervisors is that they may change a CNA’s established lunch and break time, and may re-assign CNAs to different residents and duties. In this regard, the record does not reflect who initially establishes such lunch and break times or resident assignments. More significantly, the record reveals that any such changes or re-assignments by the charge nurse are the direct result of resident care requirements. For example, a resident’s condition may change, requiring extra staff, or a resident may require extra help to go to therapy or to prepare to leave the facility for a family or doctor visit. In such circumstances, the charge nurse may assign certain residents or duties to

a CNA with a lighter work assignment, or may delay a CNAs scheduled lunch or break time until the resident's immediate needs are met. Moreover, the Employer admits that all of its CNAs are equally well qualified for any assignment, and that the only restriction on assigning CNAs to residents is where a resident has complained about abuse by a particular CNA.

It is well established that the burden of proving supervisory status is on the party asserting it. *NLRB v. Kentucky River Community Care*, 532 NLRB 706 (2001). Based upon the foregoing and the record as a whole, I find that the Employer has failed to satisfy its burden of proving that the RNs performance of charge nurse duties makes them supervisors within the meaning of Section 2(11) of the Act. In this regard, it appears that their primary duties as charge nurses involves direct patient care in conjunction with the CNAs and LPNs, and there is no evidence that charge nurses have the authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such actions. Thus, the only arguable supervisory authority attributable to the charge nurses is that they generally oversee the work performed by the CNAs, and may change a CNAs established lunch and break time or resident assignment to insure proper resident care. It is well established that such actions are routine in nature and do not require the use of independent judgment. See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, fn. 4 and 669-670 (2001); *Loyalhanna Care Center*, 332 NLRB 933, 935 (2000); *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998). Accordingly, to the extent that RNs function as charge nurses, the petitioned-for employees are not supervisors within the meaning of Section 2(11) of the Act.

3. RN Shift Supervisors

There are three petitioned-for employees whose status is disputed because they also serve as RN Shift Supervisors.² In this regard, the Employer, contrary to the Petitioner, contends that Sophia Evia, Lisa South and Francia Penabella spend a regular and substantial amount of their work time as RN Shift Supervisors, and that

² As noted above, the parties stipulated that Laureen Mancinone, Leo Tolentino, Jessie Work, and Joyclin Angel should be excluded from the unit as RN Shift Supervisors.

when doing so they possess and exercise supervisory authority within the meaning of Section 2(11) of the Act.

As noted above, RN Shift Supervisors function as Shift Supervisors, primarily but not exclusively on the weekends. They utilize the Shift Supervisor's office, have control of the keys to the facility, and are paid at an unspecified higher rate than RNs. They make rounds of the facility in the course of the shift, during which they may observe and correct the care being provided to residents by the nursing staff. They have the authority to make nursing judgments regarding resident care, physically assess residents in the event of an injury, and make changes to the resident's individualized care plan. As with the Shift Supervisors, the RN Shift Supervisors may also be assigned patient care duties for that shift.

While there is no dispute that the RN Shift Supervisor, as the highest ranking individual at the Employer's facility on weekends, is generally responsible for insuring compliance with all policies and procedures in the course of their shift, the Employer acknowledges that the RN Shift Supervisor does not exercise all of the duties and responsibilities of the Shift Supervisor. In this regard, the record reveals that RN Shift Supervisors have no involvement in evaluating employees, and, as discussed in more detail below, far less involvement in disciplining employees.

Because the RN Shift Supervisor is the highest ranking individual at the Employer's facility on weekends, one of the nursing managers is always designated as on-call from Friday evening through Monday morning. In addition, the Employer's Administrator, DON, and ADON are on-call at all times that they are not present in the facility. Thus, on weekends, the RN Shift Supervisor would first contact the on-call nursing manager and, if necessary, the ADON, DON or the Administrator in the event of an emergency or other unusual problem.

The RN Shift Supervisor's primary responsibility is to insure that there is adequate staffing of all nursing units. In this regard, in the event that there is a shortage of assigned employees for a particular shift due to "call outs" that causes the staffing level to fall below the minimum set by the DON, the RN Shift Supervisor will utilize a seniority list established by the collective bargaining agreement to attempt to secure replacement employees. However, the RN Shift Supervisor cannot require any employee to come in to work. In the event that the RN Shift Supervisor cannot secure

additional help, permission must be secured from the DON or other nursing manager to authorize overtime for an employee who has just completed their shift. However, the RN Shift Supervisor cannot require an employee to work overtime. If no additional help can be secured to cover a shortage of employees, the RN Shift Supervisor is responsible for re-assigning employees to insure adequate resident care and equalize the workload. In making such re-assignments, the RN Shift Supervisor relies upon the number of residents on a unit and their acuity levels. In this regard, as noted above, the Employer considers all of its CNAs as having the same skills, but will not assign a CNA to a resident who has previously accused that CNA of abuse.³

With regard to the re-assignment of employees in the course of a shift, the record reveals that the RN Shift Supervisors exercise the same duties and responsibilities as the charge nurses. In this regard, the RN Shift Supervisor may change an employee's established lunch and break time, and may re-assign employees to different patients or nursing units, as a direct result of resident care requirements. As noted above, such re-assignments are based upon the resident's acuity level and the relative workload of employees, and not upon the particular qualifications of a CNA.⁴

With regard to disciplining employees, the record reveals that RN Shift Supervisors may send employees home without the approval of higher management if an employee is accused by a resident of abuse, or if an employee is intoxicated. In either circumstance, the RN Shift Supervisor has no discretion but to send the employee home, and may initiate an investigation of the incident, usually by completing an incident report.⁵ However, the investigation itself will be conducted and completed under the direction of the DON and the Administrator, who make the decision as to any discipline. In the event that an RN Shift Supervisor observes a deficiency in an employee's work performance in the course of the shift, the RN Shift Supervisor may

³ RN Shift Supervisors are also responsible for employees in the housekeeping, laundry and maintenance departments when the managers of those departments are not available. Such oversight may include calling in employees and/or reassigning employees to insure adequate coverage. In performing that function, their duties, responsibilities and authority appear to be the same as providing coverage for nursing staff.

⁴ Although employee requests to leave before the end of their shift are made to the RN Shift Supervisor, the Employer's policy is to allow employees to leave due to illness or family emergency. There is no evidence that any RN Shift Supervisor has ever prohibited an employee from leaving early.

⁵ Incident reports may be submitted to management by any RN or LPN.

approach the employee and attempt to correct the deficiency on an informal basis. If the deficiency or performance problem persists, the RN Shift Supervisor may bring it to the attention of higher management by filing an incident report or sending a letter to the DON. Once again, the formal investigation and the decision as to any resulting discipline is solely in the hands of the nursing managers. There is no evidence that any employee has been disciplined as a result of an RN Shift Supervisor's recommendation.

There is also no evidence that any RN Shift Supervisor has ever been disciplined for failing to properly supervise employees in the course of their shift. However, the Employer proffered four RN job evaluations from calendar year 2003 containing notations regarding their supervisory skills. In this regard, the RN job evaluation consists of numerical rankings in 38 job functions, which coincide with the job functions set forth in the RN job description discussed above. The numerical ratings received in those 38 categories determine the RNs overall job performance rating. However, the job evaluation form contains an additional "performance summary" with an area for handwritten comments, which is where the notations about supervisory performance appear. Thus, the job evaluation for RN Rowena Reyes notes the following under the heading "Strengths": "Rowena is an excellent relief supervisor. She uses good judgment with her skills." The evaluation for RN Rolina Fajardo notes the following under "Areas Requiring Further Development": "Rolina has in fact proved to herself that she can be a relief 11-7 supervisor. She was oriented to the position and has filled the position several times even though she's very nervous about the supervisory position." The job evaluation for RN Sophia Evia notes the following under "Strengths": "excellent job with supervision", and the following under "Areas requiring further development": "needs more self confidence as supervisor." Finally, the job evaluation for RN Francia Penabella contains the following notation under Strengths: "Francis has supervisory skills and knowledge to perform her job responsibilities. She helps us a lot with our staffing need. Functions independently and works well with co-workers and residents alike. Gives suggestions/comments for better delivery of residents care."

Although DON Perugini testified that the RN Shift Supervisors have the authority to informally resolve disputes that arise in the course of the shift, the Employer proffered no specific examples of such dispute resolution. However, the record clearly reflects that RN Shift Supervisors have no involvement in the processing of grievances pursuant

to the collective bargaining agreement covering the LPNs, CNAs, and housekeeping, laundry and dietary employees.

With regard to the specific RN Shift Supervisors in dispute, records proffered by the Employer covering the period from January 1 to April 30, 2004, reveal that Sophia Evia is an RN who regularly works the night shift during the week. Evia served as an RN Shift Supervisor a total of six out of 60 shifts (10%), all during the week rather than on weekends, i.e., once in January, twice in February, twice in March, and once in April. South is a per diem RN who served as an RN Shift Supervisor a total of 6 out of 15 shifts (40%), i.e., once in January, once in February, and four times in April, but only 3 of those shifts were on weekends. Penabella is also a per diem RN who served as an RN Shift Supervisor a total of 3 out of 25 shifts (12%), i.e., once in January, once in February, and once in March, and none of those were weekend shifts. As per diem RNs, both South and Penabella schedule their shifts according to their own availability and available openings on the schedule.

It is well established that where an individual is engaged part of the time as a supervisor of unit employees and the rest of the time as a unit employee, “. . . the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his working time in a supervisory position or whether such work is merely sporadic and insignificant.” *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992). See also *Aladdin Hotel*, 270 NLRB 838, 840 (1984). The same standard has been applied to health care institutions. *Rhode Island Hospital*, 313 NLRB 343, 348 (1993).

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish its burden of proving that Sophia Evia, Lisa South and Francia Penabella spend a regular and substantial amount of their work time as RN Shift Supervisors, or that when doing so they possess and exercise supervisory authority within the meaning of Section 2(11) of the Act. More particularly, only South spends a substantial amount of her work time as an RN Shift Supervisor, but like Evia and Penabella, there is no regularity to their employment as RN Shift Supervisors. See *St. Francis Medical Center West*, 323 NLRB 1046 (1997), and cases cited therein; *Passavant Health Center*, 284 NLRB 887, 892 (1987).

Even assuming *arguendo* that Evia, South and Penabella spend a regular and substantial amount of their work time as RN Shift Supervisors, and notwithstanding the

fact that no manager or supervisor may be physically present at the facility while they serve in that capacity, the Employer has failed to prove that they possess and exercise supervisory authority within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note that there is always a designated nursing manager and higher management official on-call during those weekend shifts when the RN Shift Supervisor is the highest ranking individual at the facility. See *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989). I also note that neither Evia nor Penabella worked any weekend shifts as an RN Shift Supervisor, and that only half of South's shifts as RN Shift Supervisor were on the weekend. Moreover, the authority to send employees home for being intoxicated or for patient abuse, particularly where doing so is pursuant to Employer policy, is not an indicium of supervisory authority. See *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000); *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491, 497 (1993). The authority to change breaks has been found to be routine and not requiring the exercise of independent judgment. *Loyalhanna Care Center*, supra; *Youville Health Care Center, Inc.*, supra. Similarly, the Board has found an absence of any substantial degree of judgment involved in permitting an employee who is too ill to work or one who experiences a family emergency to go home. *Loyalhanna Care Center*, supra; *Washington Nursing Home*, 321 NLRB 366, fn. 4 (1996). The RN Shift Supervisors' authority to re-assign employees to different patients or units in response to patient care requirements, which is done by equalizing employee workload rather than by particular employee abilities or skills, is considered routine in nature and does not confer supervisory status. *Franklin Home Health Agency*, supra, 337 NLRB at 830. Nor does the authority to find replacements for employees who "call out" by offering the work to off-shift employees pursuant to a previously established seniority list confer supervisory status, particularly where the RN Shift Supervisor cannot compel any employee to come in to work or to stay past the end of their scheduled shift. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000). Finally, I note the absence of sufficient evidence showing that the RN Shift Supervisors are held accountable as a supervisor for the work performed by employees on their shift. In this regard, although an RNs supervisory abilities may be referenced in their job evaluation, there is no dispute that the job evaluation does not rate them with respect to such abilities. See *Franklin Home Health Agency*, supra, 337

NLRB at 831. Accordingly, I find that when functioning as RN Shift Supervisors, Sophia Evia, Lisa South and Francia Penabella are not supervisors within the meaning of Section 2(11) of the Act.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time, regular part-time and per diem⁶ registered nurses employed by the Employer at its Waterbury, Connecticut facility; but excluding licensed practical nurses, certified nurses aides, laundry employees, housekeeping employees, dietary employees, the administrator, director of nurses, assistant director of nurses, admissions coordinator, infection control nurse, MDS coordinator, staff development coordinator, shift supervisors, and guards, other professional employees and other supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

⁶ In accordance with the parties' stipulation, per diem RNs will be eligible to vote in the election directed herein if they average four or more hours per week during the calendar quarter immediately preceding the election eligibility date. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994), citing *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), *enfd.*, 2 F.3d 35 (3rd Cir. 1993).

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by New England Health Care Employees Union, District 1199, SEIU.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before May 24, 2004. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 1, 2004.

Dated at Hartford, Connecticut this 17th day of May, 2004.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34